

2011 Montana Legislature

BILL NO.

INTRODUCED BY

(Primary Sponsor)BY REQUEST OF

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE RECOVERY OF REASONABLE COSTS AND ATTORNEYS FEES ON FINAL DECISIONS BY THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; ADDING CHANGES IN APPROPRIATION RIGHTS TO THE ACTIONS UNDER WHICH REASONABLE COSTS AND ATTORNEYS FEES MAY BE AWARDED; LIMITING THE REASONABLE COSTS AND ATTORNEYS FEES TO THOSE ACCRUED IN DISTRICT COURT; CLARIFYING THAT THE REASONABLE COSTS AND ATTORNEYS FEES CANNOT BE ASSERTED OR AWARDED AGAINST THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; AMENDING SECTION 85-2-125; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 85-2-125, MCA, is amended to read:

**"85-2-125. Recovery of attorney fees by prevailing party.** (1) If the final decision of the department on an application for a permit or change in appropriation right is appealed to district court, the district court shall may award the prevailing party reasonable costs and attorney fees. The costs and attorney fees awarded may only relate to those costs and attorney fees that are accrued as a result of the appeal and not the underlying administrative proceedings. Costs and attorney fees may not be asserted or awarded against the department under this section.

(2) The party obtaining injunctive relief in an action to enforce a water right must be awarded reasonable costs and attorney fees. For the purposes of this section, "enforce a water right" means an action by a party with a water right to enjoin the use of water by a person that does not have a water right.

**NEW SECTION. Section 2.** Effective date. [This act] is effective on passage and approval.

END

## **Enforcement legislation**

**Subject: Attorney fees -- allow recovery in both the permit and change process -- limit recovery to judicial proceedings -- disallow recovery against the DNRC -- amend Mont. Code Ann. § 85-2-125(1).**

The pertinent subsection of the statute is as follows: **85-2-125. Recovery of costs and attorney fees by prevailing party. (1) If a final decision of the department on an application for a permit is appealed to district court, the district court shall award the prevailing party reasonable costs and attorney fees.**

One of the elements of a water right under the prior appropriation doctrine is the right to change a place of use, purpose of use, point of diversion, or place of storage. Both senior and junior users have the right to prevent a change when it would adversely affect either the junior or senior water right. This principle allows all water right holders to enforce their water right. The place to obtain a change authorization or to prevent a change authorization is in an administrative hearing before the Department of Natural Resources and Conservation.

Mont. Code Ann. § 85-2-125(1) allows for recovery of costs and attorney fees "if a final decision of the department (natural resources and conservation) on an application for a permit is appealed to district court." This tool is not provided to persons with the right to make a change and to persons to protect their rights against adverse effect occasioned by a change.

The first question is whether it is good public policy to allow a person who has no water right but wishes to come on to the chain of priorities a right to recover attorney fees when the same right of recovery is not given to an existing water right holder who seeks a change of water right. Likewise, why does not an existing water right holder have the right to recovery of attorney fees whether he/she is an objector to a new permit or a change in water right?

The second question is whether it is good public policy to allow costs and attorney fees to be assessed against the department (natural resources and conservation) if the agency appears in the district court to defend its decision. If not, should the statute specifically shield the agency from costs and attorney fees? Should agencies such as DEQ and DFWP (or other political subdivisions) be shielded from costs and attorney fees?

The third question is whether it is good public policy to allow the collection of costs and attorney fees in the administrative process or simply for costs and attorney fees in the district court process? Is there a chilling effect on filing applications or objections knowing that if the matter is appealed there is the possibility for the assessment of costs and attorney fees arising from the administrative process?

Finally, would it be better public policy for a district court to have discretion in awarding costs and attorney fees; as written the statute is mandatory and not discretionary.